



POLICE DEPARTMENT CITY OF NEW YORK

January 11, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Aldo Yubini
Tax Registry No. 939729
122 Precinct
Disciplinary Case No. 2013-10908

Charges and Specifications:

1. Said Police Officer Aldo Yubini, while on-duty and assigned to the 122nd Precinct, on or about June 12, 2012, wrongfully made inaccurate entries in Department records, in that said Police Officer prepared a Complaint Report to reflect "Petit Larceny" when it should have been classified as a "Robbery." (*As amended*)
P.G. 203-05, Page 1, Paragraph 4 – PERFORMANCE ON DUTY
2. Said Police Officer Aldo Yubini, while on-duty and assigned to the 122nd Precinct, on or about June 12, 2012, failed to notify the Detective Squad that further investigation was required for a Robbery involving a firearm.
P.G. 207-07 - PRELIMINARY INVESTIGATION OF COMPLAINTS

Appearances:

For Department Advocate's Office: Samuel Yee, Esq.
For Respondent: John Tynan, Esq.

Date of Hearing:

October 16, 2015

Decision:

Specifications 1 and 2: Guilty

Trial Commissioner:

Rosemarie Maldonado

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REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 16, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Steven Gambardella and Minor A as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDING AND ANALYSIS

The following is a summary of the undisputed facts in the instant matter. At approximately 1345 hours on June 12, 2012, fourteen year-old Minor A exited the [REDACTED] station in Staten Island. He was planning to meet up with friends who lived near the station. (Tr. 59-60) An unidentified unknown male, who was wearing a hoodie, also exited the station. (Tr. 45, 68-69) Minor A asked the unidentified male for directions and they walked together. The unidentified male asked, or demanded, to see Minor A's iPod, Beats headphone and gold necklace. Minor A handed over his items and the unidentified male fled with the property. (Tr. 48, 83)

Minor A called 911 from a convenience store. The 911 Sprint report documented Minor A's report that he had been robbed by a male with a gun who was wearing a gray hoodie, basketball shorts and multicolored sneakers. (Department's Exhibit ("DX") 2)

On that date, Respondent was working on an Anti-Crime team with Sergeant Michael Lazzara and Police Officer Wittek. While in an unmarked police vehicle, they

received a 10-20 "past robbery" call over the radio. The 911 operator indicated that there had been a firearm involved. (Tr. 80) About five minutes after receiving the 10-20 call, the officers met Minor A at the [REDACTED]. (Tr. 79) Minor A provided a description of the individual who had taken his property and got into the officers' vehicle to canvass the area in an attempt to find the perpetrator. (Tr. 84) The canvass yielded no results. (Tr. 32, 66, 92)

Minor A accompanied the officers back to the precinct where a complaint report was prepared. (DX 3, 4) The complaint was classified as a petit larceny and stated in relevant part:

At T/P/O, C/V states he willingly handed unknown perp listed items and when c/v asked perp to return items he refused and fled scene. Canvass conducted of immediate area. Neg. results. No video available.

Lazzara called Minor A's father and Respondent subsequently dropped him off at his father's place of employment. (Tr. 87; Respondent's Exhibit ("RX") A at 22).

Several months later, the Quality Assurance Division received an allegation of improper crime reporting in the 122 Precinct. Several complaints prepared by officers in that precinct were reviewed and investigated.¹ Sergeant Nicholas Spataro determined that the complaint in the instant matter was misclassified based on a review of the 911 Sprint report and a conversation with Minor A (Tr. 8-9, 17). Spataro noted the following in a Quality Assurance Division Complaint Report Misclassification Coversheet:

Victim stated that when he had approached perpetrator to ask for directions perpetrator had his hand in his hooded sweatshirt pocket and claimed to have a gun. Victim further stated that perpetrator asked for his head phones (which was attached to his iPod) and necklace (which was around his neck) and fled with the property. Victim stated that he informed the responding officers of these details. (DX 1).

¹ The transcript of Lazzara's Department interview, which was entered into evidence by Respondent, included questioning about multiple complaint reports and admitted misclassifications.

The document indicated that the complaint should have been upgraded to "Robbery 3" on the grounds that "force was used to steal property from victim." Minor A was again interviewed by telephone by Sergeant Steven Gambardella of the Quality Assurance Division on March 19, 2013. During that interview, he reiterated that the perpetrator told him he had a gun and that he told this to the officers. (Tr. 22; DX 6 at 6-7, 9-10)

Sergeant Gambardella also conducted a Department interview of Sergeant Lazzara on April 9, 2013. During that interview, Lazzara asserted that Minor A did not tell them the perpetrator had a gun. (Tr. 28-30; RX A at 21-22, 25)

In dispute is whether Respondent erred by failing to classify the incident as a robbery and failing to notify the Detective Squad that further investigation was required for a robbery involving a firearm. Central to this dispute is whether Minor A told Respondent that a weapon was involved in the incident. For the following reasons I find that Minor A disclosed to Respondent that a firearm was involved and that the complaint should have been classified as a robbery.

Minor A testified that shortly before 1400 hours on June 12, 2012, he was walking from the train when "a guy in a hoodie came from the back of me . . . and he told me, 'Give me your stuff.'" (Tr. 69) He further asserted at trial that the perpetrator "said he had a gun" and "his hand was inside his hoodie going down my back." (Tr. 45-46)² Although Minor A did not see the gun, he gave the unidentified male his iPod, Beats headphones and a gold chain necklace. Minor A explained that he surrendered the items because he was "scared" and "didn't want to die." (Tr. 51, 53) On cross-examination, Minor A added that the perpetrator claimed to have been recently released from prison. (Tr. _____)

² On cross-examination Minor A clarified that the perpetrator pointed the gun at his back and that he never actually felt the gun. (Tr. 52)

60-61) According to Minor A, the perpetrator entered a convenience store a few blocks away. He followed from afar and later entered the store to place a 911 call. (Tr. 48-49, 70-71)

Minor A contended that when the police arrived, he told the officers "everything," including that the perpetrator had a weapon and had recently been in prison. (Tr. 49-50, 60-61) He remembered that the officers were in uniform³ but could not remember if he told the officers he wanted to go home once they brought him back to the precinct. (Tr. 62-65) He recalled having one telephone interview with a member of the Quality Assurance Division following the incident, not two. (Tr. 53-57, 67-68) He denied having been the victim of a robbery prior to this incident. (Tr. 62)

Respondent provided a very different account of what Minor A told him on the date of the incident. Respondent indicated that the 911 operator advised over the radio that there may be a weapon involved. (Tr. 79-80) He recalled that Minor A was "nonchalant" and stated, "somebody just took my stuff." (Tr. 80-81) He further testified that Minor A said that he met the perpetrator for the first time on the train, asked for directions when they both got off and began walking together. (Tr. 81, 92) Minor A told Respondent that while they walked, the perpetrator asked to see the headphones, the iPod and the chain and that he "just lent it to him." (Tr. 84) When asked why he would give over his items Minor A responded, "he seemed cool" or he "seemed all right." (Tr. 84-85)

Respondent contended that he asked Minor A "numerous" times about whether a gun was involved and that Minor A repeatedly stated, "no gun displayed, there was no gun." (Tr. 82) Respondent denied Minor A mentioning anything about the perpetrator stating he had recently gotten out of prison. (Tr. 83)

³ Respondent testified he, Lazzara and Wittek were in plainclothes on the afternoon of the incident. (Tr. 78)

Respondent explained that he and his supervisor decided to classify the job as a "petit larceny" because "it seemed like there was no gun involved. He never felt scared. He never feel threatened. He just willingly gave the property over because -- the kid seemed cool" (Tr. 86) He agreed that it was "puzzling" that Minor A would willingly give over his items but thought he might have done so because Minor A hoped to befriend him. (Tr. 86)

Additional information was provided by Sergeant Lazzara at an official Department interview conducted on April 9, 2013. Lazzara recounted that the call came over the radio as a 10-20, possible gunpoint robbery. (RX A at 19-20) He stated that while canvassing the area in his vehicle, Minor A told him that he began talking with the perpetrator on the train and that he seemed like a nice guy. He "didn't think anything of" handing over his property to this individual but when he asked that the items be returned, the perpetrator walked off with the property. (RX A at 21) According to Lazzara, Minor A denied that the perpetrator used a weapon or simulated that he had a weapon. (RX A at 23, 25) Minor A also denied being threatened in any way. (RX A at 28) Lazzara remembered, "we [the officers] kind of just looked at each other and thought that was a little bit, you know, ridiculous," and that he found Minor A's account of what transpired "extremely odd." (RX A at 21, 29)

Lazzara further recounted that upon arriving back at the precinct, he wanted to show Minor A a photo array of potential perpetrators but Minor A insisted that he wanted to go home and asked if he could call his father. (RX A at 22, 27) He recalled speaking with Minor A's father who told him, "This isn't the first time this happened to this kid. . . I don't know if he just wants friends . . . I'll take care of it." (RX A at 22)

Lazzara acknowledged that he spoke to MinOr A mostly while they were in the vehicle canvassing the area for the suspect and that Respondent handled taking his statement at the stationhouse. (RX A at 27-28) Finally, Lazzara asserted that classifying the incident as "petit larceny" instead of robbery was "absolutely not" an effort to avoid an index crime. (RX A at 27)

Resolution of this case turns on a determination of credibility. Only Respondent, his team and MinOr A know with certainty what actually occurred during this encounter, yet their testimony was diametrically opposed with respect to the critical issue in this case. Thus, it is left to this tribunal to try to sort out which version was closest to the truth. In making such assessment, the trier of fact should consider a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness' account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness' account is logical and comports with common sense and general human experience.

For the following reasons, I credit MinOr A's testimony. First, it is undisputed that MinOr A told the 911 operator that the perpetrator had a gun. Not only is this detail noted in the 911 Sprint Report, Respondent concedes that he received the radio run as a "10-20" past robbery with a possible gun involved. It strains credulity that MinOr A would then leave out or deny this key detail just a few minutes later when he spoke to the responding officers. Second, having observed MinOr A's demeanor at trial, I found him to be entirely genuine when he stated, "I was scared . . . I didn't want to die. He has a gun. I could just die right there on the spot." (Tr. 51) Even years after the incident, his fear and belief that

he could have been shot by this perpetrator was quite palpable. As such, it is difficult to believe that he would not have expressed this to the officers just moments after the offense transpired.

Finally, and perhaps most significantly, Minor A lacks any motive to fabricate his story. He stands to gain nothing from coming before this tribunal and reliving an upsetting experience where he was victimized. There is no evidence that he sought to take any kind of legal action or institute any sort of complaint against Respondent. He simply answered questions when contacted by the Quality Assurance Division several months after the incident. When asked specifically about Respondent, he even told the investigator that "he was nice" and denied that Respondent tried to get him to change his story. (DX 6 at 16-17) In sum, the record provided no credible explanation as to why Minor A would come before this tribunal more than three years after the incident and lie about what he told Respondent on the day in question.

In making this finding I note that Minor A's testimony was not impeccably consistent with prior statements. For example, the account that Minor A provided to Sergeant Gambardella in March 2013 painted a slightly different picture of the incident in question. During that interview he said that the perpetrator "didn't threaten [him] with [the gun]," but just told him he had one and gestured to his sweatshirt pocket. (DX 6 at 9-10, 12) He further recounted that the perpetrator "said he wanted to see [the items]" and that he "said he was going to give them back." (DX 6 at 5-6). He even acquiesced that his memory of the event was a "little foggy" and that he was trying to forget the incident. These oddities and inconsistencies, however, can reasonably be attributed to his young age and the time that had passed between the incident and his recounting of events.

Moreover, even given these inconsistencies, he was firm in his assertion that he told the responding police officers that the individual had a gun. (DX 6 at 8-9)

For all of these reasons, I find that the Department has shown, by a preponderance of the credible evidence, that Minor A told Respondent that he believed the perpetrator had a gun. Accordingly, Respondent should have classified the Complaint Report as a robbery. *See* N.Y. Penal Law § 160.05 ("A person is guilty of robbery when he forcibly steals property."). As such, Respondent is Guilty of Specification 1.

Because the Complaint Report should have been classified as a robbery, Respondent was obligated, under the Patrol Guide, to notify the Detective Squad that further investigation was required for a robbery involving a firearm. In instances of robbery, "where a firearm or dangerous instrument was used," the officer preparing the Complaint Report worksheet must "notify and refer the case to the detective squad" for further investigation. *See* P.G. § 207-07, p.2, para. 7(b). Respondent admitted he made no such notification, testifying incorrectly that there was "no need." (Tr. 92)

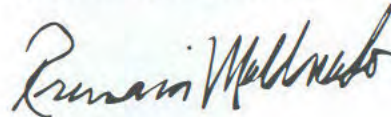
Accordingly, he is Guilty of Specification 2. **PENAL TY RECOMMENDATIONS**

I recommend that of ten (10) vacation days, as requested by the Department Advocate. Having weighed all the facts and circumstances, I find this to be a fair and reasonable penalty that balances the importance of accurate reporting and documentation with Respondent's consistently high performance evaluations and lack of prior disciplinary history.

This recommendation is also consistent with penalties in recent Department cases involving similar misconduct. *Case Nos. 2013-9076 & 2013-9077* (July 24, 2015)

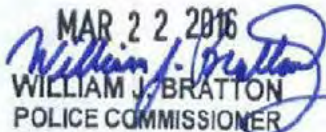
addressed a very similar set of circumstances. In those companion cases, experienced police officers, with no disciplinary records, negotiated a penalty of ten (10) vacation days for improperly classifying an incident that was reported as a robbery involving a firearm as petit larceny. *See also Case No. 2014-11091* (September 8, 2014) (seventeen year sergeant with no prior disciplinary history negotiated a penalty of 10 vacation days for wrongfully making inaccurate entries in Department records, in that, he prepared a complaint report for "lost property" when it should have been classified as "robbery").

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAR 22 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ALDO YUBINI
TAX REGISTRY NO. 939729
DISCIPLINARY CASE NO. 2013-10908

Respondent was appointed to the Department on July 11, 2005. His last three annual evaluations were 4.5 overall ratings of "Extremely/Highly Competent" in 2012, 2013 and 2014. He has two medals for Excellent Police Duty and five medals for Meritorious Police Duty. Respondent has no prior formal disciplinary history.

[REDACTED]

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials